ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Water Docket
U.S. Environmental Protection Agency
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Attention: **Docket ID No. OW-2002-0050**

Subject: **Comments on the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States."**

Dear Administrator Whitman:

Thank you for the extended opportunity to comment on the recently issued Advance Notice of Proposed Rulemaking ["ANPRM"] in the Federal Register [68 FR 1991, January 15, 2003] on issues related to the scope of the Clean Water Act and the implications of the U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ["SWANCC"].

EPA and the Corps have determined that the SWANNC decision eliminates Clean Water Act (CWA) jurisdiction over intrastate, non-navigable, isolated waters where the sole basis for asserting jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. EPA and the Corps are now considering a rule making to change the regulatory definitions of "waters of the United States" including "isolated waters" to ensure that the definitions are consistent with the SWANNC decision, and are soliciting comments on whether a water's uses for commerce purposes should continue as a basis for CWA jurisdiction.

The Arizona Department of Environmental Quality [ADEQ] is concerned that the ANPRM goes beyond the narrow holding in SWANNC and foreshadows a potential rollback of federal protections under the CWA.

The Proposal Under Review

EPA and the Corps solicited comments on the use of the factors in 33 CFR §328.3(a)(3)(i) - (iii) or its counterpart federal regulations that are used to determine CWA jurisdiction over intrastate waters.

The ANPRM questions long-standing, traditional tenets of CWA jurisdiction over intrastate waters (i.e., recreational use by foreign or interstate travelers or some other nexus with foreign or interstate commerce such as commercial fishing or use by industries in interstate commerce) and opens the door to a broad re-interpretation of CWA jurisdiction. If a rule making goes forward that resembles the ANPRM, it would remove CWA protections from "waters of the United States" that have, until now, been regarded as subject to protection under the Act because of their links to recreation and interstate commerce.

The ANPRM states that while the SWANNC decision specifically involved the dredge-and-fill permit program under §404 of the Clean Water Act, the decision "may affect" the scope of regulatory jurisdiction under other provisions of the Clean Water Act, including the water quality standards program under §303, the regulation of oil spill and hazardous substance releases under §311, the water quality certification program under §401, and the NPDES permitting program under §402 of the Clean Water Act.

Effect on Arizona

The proposed change will have a profound impact on the authority of state environmental protection agencies like ADEQ to implement its water quality management programs, to prevent pollution, and to maintain and protect the biological, chemical, and physical integrity of Arizona's waters. ADEQ is designated as the state agency for all purposes of the CWA (A.R.S. §49-202) and depends on the full implementation of its CWA programs to protect the state's water resources. These CWA programs are the state's core regulatory programs to prevent pollution of Arizona's streams and lakes. Alternative regulatory authorities are not available.

Over 95% of the surface waters in Arizona are identified as intermittent or ephemeral streams. These intermittent and ephemeral streams are critically important water resources and integral parts of the watersheds in our arid state. They have important functions and aesthetic values and provide immense benefits, including flood control, water quality protection, ground water recharge, wildlife habitat (including habitat for threatened and endangered species), and recreation. ADEQ currently considers all such waters to be subject to protection under the CWA. In many cases, these "waters of the United States" drain into larger rivers and streams that are clearly considered to be jurisdictional waters under the Act. If the state loses the ability to protect water quality in ephemeral and intermittent streams, it may be impossible to protect water quality in the downstream streams, lakes and reservoirs into which they flow.

In December 2002, Arizona obtained primacy to administer the Arizona Pollutant Discharge Elimination System (AZPDES) permit program under §402 of the CWA. Arizona has authority under Arizona Revised Statute § 49-203(A)(2) to administer a permit program that is "consistent with but no more stringent than the requirements of the CWA for the point source discharge of any pollutant or combination of pollutants into navigable waters." Alternative authorities to regulate the point source discharge of pollutants to surface waters in Arizona are not available under our state law. A re-definition of the regulatory definition of "waters of the United States"at the federal level that restricts the jurisdictional scope of the Act and the applicability of

§402 will have a profound impact on ADEQ's ability to regulate the point source discharge of pollutants to Arizona surface waters -- placing virtually 95% of the State's waters outside the CWA protections. There would be no prohibitions against discharges of pollutants (CWA § 301), no requirements to get permits (§ 402 and §404) and no enforcement provisions.

Reducing the scope of the federal program would require states to replicate those responsibilities in each state. This will cause significant program disruption, additional state costs, potential lapses in regulation and eventual reduction in federal funding support for the program. As noted above, Arizona just recently became the 45th state to assume primacy for the NPDES Program. A redefinition of the CWA jurisdiction will affect how the state manages discharges to its ephemeral, effluent dependent and intermittent streams. Much of the new growth in Arizona is in areas featuring predominantly ephemeral systems. Hindering the state's ability to protect water quality in ephemeral streams would jeopardize the chemical, physical and biological integrity of downstream rivers, streams and lakes. This would also hamper the development of TMDL implementation plans in the downstream jurisdictional waters and would likely lead to more waterbodies being placed on the 303(d) list of "impaired waters".

Arizona, like many states, does not have a wetlands permitting program and relies on the CWA section 401 certification process as its primary tool to protect wetlands and riparian areas. The agency's existing programs do not replicate the U.S. Army Corps of Engineers CWA Section 404 program, nor do we have guidelines similar in scope to the CWA section 404(b)(1) or a consultation process in place with federal agencies to ensure protection of federally listed endangered or threatened species. Given the ongoing budget concerns of our state and many others, creation of such programs and partnerships is unlikely in the near future.

The CWA is widely regarded as one of the most successful pieces of environmental legislation ever enacted by Congress. EPA and the Corps should not go forward with a rule making that creates additional legal uncertainty and which restricts the jurisdictional scope of the CWA. Rather, EPA and the Corps should narrowly interpret the holding in SWANNC and limit its applicability to the specific facts of the case.

Sincerely,

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c: Stephen A. Owens, Director